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PICKETING A STORE—INJUNCTION.—In the November (1903) number of THE AMERICAN LAW REGISTER there appeared an article upon the case of *Foster* v. *Retail Clerks' International Protective Association* (78 N. Y. Suppl. 860, 1902). This outlined the position of the New York Supreme Court in holding that mere picketing, if it is peaceful and without threat or intimidation, cannot be regarded in any sense as unlawful. It seemed to be taken as a matter of course that to intimidate and threaten should be enjoined, and accordingly an order was issued to restrain the defendants from "the use of threats, violence, or intimidation with the intent of preventing customers from entering the store of the plaintiffs." Whatever may be the difference of opinion as to the lawfulness of peaceful persuasion not to trade, the authorities seem to agree that the "use of force, or threat, or menace of harm to persons or property" is not to be tolerated, and that the courts should issue injunctions

to prevent it. There can hardly be much dispute as to when ordinary physical force or violence is used in a strike; the difficulty in the picketing cases arises when this is not present. It is hard to determine just what constitutes intimidation, and to distinguish where advice and peaceful persuasion become a threat.

It has been held that all picketing is a threat, that the word is borrowed from the vocabulary of war and taken appropriately, and that the only way in which picketing could be effective would be to produce in the minds of the non-union men a feeling of fear. (*Otis Steel Co.* v. *Local Union,* 110 Fed. 698, 1901.) This position has been assailed again and again and injunctions have been refused because the picketing was not accompanied by any intimidation. (*Kerbs* v. *Rosenstein,* 67 N. Y. Suppl. 385, 1900; *Standard Tube* v. *International Union,* 9 Ohio Dec. 692, 1899.) At the other extremity of the positions possible to take upon this subject is the argument of counsel that picketing is legal if it stops short of actual physical violence. This, Mr. Justice Mitchell says, is a most serious misconception (*O'Neil* v. *Behanna,* 182 Pa. 243, 1897), and the issuing of the injunctions in most of the cases that I shall quote refutes it.

Calling workmen "scabs" and "blacklegs" is frequently one of the circumstances that warrant an injunction, and in *O'Neil* v. *Behanna* it was held to amount to more than mere argument and persuasion and the legitimate conduct of a strike. In *Murdock Kerr* v. *Walker* (152 Pa. 595, 1893) these words were avowed to be part of a system intended to make the men "sick and tired" of working, and the injunction was framed to include "opprobrious epithets." In *Wick China* v. *Brown* (164 Pa. 449, 1894) to hold up employees to the ridicule and contempt of bystanders was forbidden. A banner displayed in front of a factory requesting workmen to keep away was held by the Supreme Judicial Court of Massachusetts (*Sherry* v. *Perkins,* 147 Mass. 213, 1888) to be, not a libel, but a means of threat and intimidation to prevent persons from entering the employment of the plaintiffs.

But more difficult than these cases of threats clearly uttered are those where the men say nothing, or use phrases that may be interpreted as a threat or not. When strikers are well restrained and disciplined they usually are most ingenious in keeping to the letter of the law, but, to quote Judge Hammond (*Amer. Steel Wire* v. *Drawers,* 90 Fed. 608, 1898), "they exert the most potent and unlawful force or violence without lifting a finger against any man, or uttering a word of threat against him." This usually is accomplished by assembling the

strikers to meet those who remain at work, ostensibly to *appeal* to them and to *persuade* them to leave it.

During one of the coal strikes in West Virginia a company of about two hundred men went into camp a mile from the mine openings. Every morning they would march along the road near the company's property, but not on it, and then countermarch through the village, all the time in a sober and decent manner. The court held that this was neither an aid to fair argument nor conducive to the state of mind that makes willing converts, and that it did intimidate a number of miners. Accordingly, the defendants were put to jail for violating an injunction against threats, menaces, and any character of intimidation (*Mackall* v. *Ratchford,* 82 Fed. 41, 1897).

An exhibition of force has been made by keeping always near the shops large bodies of men, massed and controlled by leaders (*Amer. Steel Wire* v. *Drawers*); by filling a train-yard with a surging crowd of strikers in a fever heat of excitement, although no actual violence was done (*U. S.* v. *Kane,* 23 Fed. 750, 1885); by parading a group of men up and down in front of a boycotted saloon, each man dressed in ragged clothing, having labels pasted on him and distributing circulars displaying the word "Boycott" (*People* v. *Wilzig,* 4 N. Y. Crim. Rep. 403, 1886); and by "creating an unfriendly atmosphere everywhere" (*O'Neil* v. *Behanna*).

The very fact that there is a large crowd of men seems to constitute a threat, and to convert persuasion into intimidation. Indeed, said Judge Mitchell in this last case, "the arguments and persuasion and appeals of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. This display of force, although none actually is used, is intimidation and as unlawful as violence itself."

Whether an act is intimidation or not must be found from its effect and the purpose with which it is done; the test to be applied is whether an ordinary man would be intimidated. That a company went to great expense to board and lodge its employees in its own mill-yards, and provided guards for those who went daily to their homes has been regarded as good evidence that the strikers were guilty of intimidation, for otherwise the company would not have taken these precautions nor their men have submitted to them. (*Otis Steel Co.* v. *Local Union.*)

The character of the picketing and the purpose of the strikers is not to be judged only from their professions. A request may be the most effective threat and kindly advice sardonic. The court must look at things as they really are, and construe actions and words according to all the circumstances surround-

ing. (*People* v. *Kostka,* 4 N. Y. Crim. Rep. 434, 1886.) *In re Wabash R. R. Co.* (24 Fed. 217, 1885) was a case where the bosses received a notice "requesting" them to keep away from the shops, and saying that thereby they would "command the protection" of the strikers, "but in no case are you to consider this intimidation." The court held that this implied threat would justify placing the perpetrators under peace bonds and it found them guilty of contempt. In *U. S.* v. *Kane* (23 Fed. 750, 1885) Judge Brewer puts the case of a man discharged, who, securing a number of armed friends and coming around to one who had refused to leave in sympathy, says, "I request you to leave." "This is nothing," said the Judge, "but a simple request—that is, so far as the language which is used; there is no threat. . . . Now the common-sense of every man tells him that while the language used may be very polite and be merely in the form of a request, yet it is accompanied with that backing of force intended as a demonstration . . . and the man leaves really because he is intimidated."

The rule of what shall constitute a threat or menace in these cases seems to be this: If the acts or the words, whatever the pretence, do as a matter of fact amount to intimidation, then they are to be taken as such, and the picketing should be enjoined.

P. D.